Transportation Workers Union of America, AFL–CIO and its Local 525 (Johnson Controls World Services, Inc.) *and* Douglas J. Nelson. Case 12–CB–3801

July 31, 1998

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HURTGEN

On May 12, 1995, the National Labor Relations Board issued a Decision and Order[1] in this proceeding adopting the judge's findings that the Respondent, Transportation Workers Union Local 525, did not violate Section 8(b)(1)(A) by threatening to invoke the contractual union-security clause against Charging Party Douglas Nelson if Nelson ceased paying union dues after the Local lawfully had expelled him from membership. In so doing, the Board adopted the judge's finding that, in *Boilermakers (Kaiser Cement Corp.)*, 312 NLRB 218 (1993),[2] the Board had overruled, sub silentio, earlier cases including *Steelworkers Local 4186 (McGraw Edison Co.)*, 181 NLRB 992 (1970). The Board also adopted the judge's finding that, under *Kaise*r, although the Respondent Local Union lawfully had expelled Nelson from membership, the Respondent Local was still required to represent him and thus Nelson remained obligated under the terms of the union-security provision as a represented bargaining unit employee.

On July 12, 1996, while the case was pending before the Eleventh Circuit Court of Appeals on the Charging Party's petition for review, the Board asked the court to remand the case to it. The Board informed the court that it intended to vacate its Decision and Order pending reconsideration of the case. On September 24, 1996, the court granted the Board's motion. On October 29, 1996, the Board vacated the Decision and Order and solicited the positions of the parties on remand.

In their statements of position, the General Counsel and the Charging Party argue that the Union violated Section 8(b)(1)(A) by threatening to invoke the union-security clause against Nelson who had been permanently expelled from union membership because of his protected, decertification-related activity.[3] They assert that this conclusion is supported by *McGraw Edison* and its progeny,[4] as well as by the second proviso to Section 8(a)(3). That proviso prohibits enforcement of union-security provisions against individuals for whom union membership has been denied or terminated for reasons other than their failure to tender periodic dues and fees. The General Counsel and the Charging Party further argue that *Kaiser* is distinguishable because, among other things, there the employees threatened with application of the union-security provision had been disciplined but not expelled from membership.[5] Finally, the Charging Party contends that the Board should find the Respondent International Union, as well as its Local 525, liable for the 8(b)(1)(A) violation because Local 525 was acting as the International's agent when it was unlawfully threatening Nelson.

In their response, the Respondents argue that the Board should reaffirm its dismissal of the complaint under *Kaiser,* and expressly overrule *McGraw Edison* and its progeny. The Respondents assert that *McGraw Edison* is irrelevant because it predates *Communications Workers v. Beck*, 487 U.S. 735 (1988), where (according to the Respondents) the Supreme Court specifically recognized that unions need not tolerate free riders. They further contend that requiring Nelson to pay his financial-core contribution following expulsion from the Union, and threatening his discharge if he did not, does not conflict with proviso (B) to Section 8(a)(3) because "financial-core" membership was not denied Nelson for any reason other than his failure to pay financial-core dues.

Analysis

We have considered the judge's decision in light of the exceptions, briefs, and statements of position on remand, and have decided to affirm the judge's rulings, findings,[6] and conclusions only to the extent consistent with this Decision and Order.

Contrary to the judge, we find that the Respondent Local 525 violated Section 8(b)(1)(A) by threatening employee Nelson with discharge if Nelson failed to tender union dues and initiation fees (referred to as dues and fees) in circumstances where the Union previously had permanently expelled him from membership for a reason other than his failure to tender dues and fees (his activities in support of a rival union). We hold that where, as here, a union terminates, even lawfully, a unit employee's membership for a reason other than failure to tender dues and fees, the union thereafter is precluded from insisting, under the terms of a union-security

[1] 317 NLRB 402. No current Board member participated in that decision.

[2] Enfd. sub nom. *Gilbert v. NLRB*, 56 F.3d 1438 (D.C. Cir. 1995), cert. denied 116 S.Ct. 1261 (1996).

[3] Specifically, Nelson had been expelled for signing a petition supporting representation by another labor organization at a time when a Board election could have been held.

[4] See, e.g., *Dillingham Tug & Barge Corp.*, 278 NLRB 83, 86 (1986); *Communications Workers Local 9509 (Pacific Telephone Co.)*, 193 NLRB 83 (1971); and *Telephone Traffic Union (New York Telephone Co.)*, 241 NLRB 826 (1979).

[5] The Charging Party additionally argues that *Kaiser* was wrongly decided and that the Board should return to the *McGraw Edison* line of cases under which unions violate Sec. 8(b)(1)(A) by enforcing union-security provisions against employees disciplined by denial, suspension, or termination of membership, or by significant impairment of membership rights, even if the discipline was lawful.

[6] We agree with the judge that no issue concerning *Communications Workers v. Beck*, 487 U.S. 735 (1988), was raised or litigated in this case.

clause, that the employee remit dues and fees to it as a condition of continued employment.

We find that this conclusion is required by proviso (B) to Section 8(a)(3) of the Act.[7] Under proviso (B), an employer is precluded from discriminating against employees for nonmembership if it has reasonable grounds for believing that membership was "denied or terminated for reasons other than the failure of the employee to tender periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership."[8] Here, Nelson's membership was terminated for decertification-related activities, and not because he failed to pay membership dues and fees. Thus, if Nelson's employer had discharged Nelson because of a failure to pay dues and fees, that discharge would have been unlawful under Section 8(a)(3). And, if the Respondent had caused, or attempted to cause, that discharge, the Respondent would have violated Section 8(b)(2). The only reason why there is no 8(b)(2) violation here is that the Respondent threatened Nelson directly rather than going to his employer. However, since that direct threat, unjustified under the provisions of Section 8(a)(3) and Section 8(b)(2), was coercive of Nelson's Section 7 right to refrain from supporting the Union, the threat violated Section 8(b)(1)(A).

The Respondent argues that the word "membership" in Section 8(a)(3) has been stripped to its financial core (the payment of dues and fees), and that "membership" in this sense has not been denied to Nelson. That is, he is not denied "membership" in the sense of paying dues and fees (and indeed he is urged to do so). The argument has no merit. It is true that the union-security obligation under Section 8(a)(3) is only that employees must pay dues and fees. Thus, if the employee declines to pay dues and fees, and membership is denied him *for that reason*, the union can seek his discharge. However where, as here, membership is denied for other reasons, the clear language of Section 8(a)(3) and Section 8(b)(2) clearly states that the union may not seek his discharge.

We further find that *Kaiser Cement* does not warrant a contrary result. In *Kaiser*, the individual threatened with enforcement of the union-security provision remained a union member, though with diminished privileges of membership. Hence, proviso (B) to Section 8(a)(3) was not explicitly implicated.[9] Conversely, here, Nelson had been expressly and permanently terminated from union membership. Therefore, when Local 525 thereafter insisted that Nelson pay dues and fees or face discharge under the union-security provision, it was precisely the situation encompassed by the proviso.

Finally, we find that the International Union is liable with Local 525 for this 8(b)(1)(A) violation.[10] Thus, the union-security provision at issue is contained in the collective-bargaining agreement to which the International, Local 525, and Johnson Controls are parties. Under the terms of that agreement, it is the obligation of *the International or its agent* to notify employees of arrearages in dues or agency fee payments. The collective-bargaining agreement further specifies that if a notified employee thereafter fails timely to remit the required payments, *a representative of the International, or its designee*, shall instruct the employer to discharge the employee for failure to comply with the union-security provision.

Pursuant to these contractual provisions, Local 525 President Eddie Hill wrote Nelson on February 4, 1994, notifying him of his arrearages and instructing him to make immediate payments.[11] By virtue of the terms of the contract, Hill was acting with at least the apparent authority of the International when writing Nelson. Further, it appears that the International acceded to Hill's action by virtue of the fact that copies of the February 4 letter were sent to International Vice President Roberts and to the International's attorney. Similarly, when Hill informed Nelson on February 8 that that the Union would seek his termination under the union-security provision of the contract if he failed to remit dues, Hill was acting with apparent authority from the International, which was designated under the contract as the party authorized, acting either on its own or through an agent, to seek the discharge of employees who failed to comply with the union-security provision.

CONCLUSIONS OF LAW

1. At all pertinent times the Company was an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Respondents

[7] Member Hurtgen views this position as a reasonable interpretation of the Act. He does not reach the issue of whether it is required by the Act.

[8] Sec. 8(b)(2) contains almost identical language.

[9] To the extent that *Kaiser* can be read to protect union efforts to invoke union-security provisions against individuals whom it has denied or expelled from membership, it is hereby clarified. We note that in upholding the Board's decision in that case, the court of appeals specifically distinguished cases that involved denial of membership or expulsion.

Chairman Gould notes that in *McGraw Edison*, the Board held that the union violated Sec. 8(b)(1)(A) by threatening to invoke a union-security clause to enforce the payment of dues from an employee whose union membership was "significantly impaired" rather than completely terminated as punishment for engaging in protected Sec. 7 activity. He agrees with the holding in *McGraw Edison* and would overrule *Kaiser* to the extent that it can read as overruling *McGraw Edison*.

As this issue is not presented in this case, Member Hurtgen does not pass on it.

[10] Although the issue of the International Union's liability for the unfair labor practice was both pled and litigated, the judge did not reach this issue because he found that the conduct of Local 525, whose representative uttered the threat, did not violate the Act.

[11] Indeed, when Nelson asked Hill why he had written the letter, rather than the International as specified in the contract, Hill did not disclaim that the letter was the contractually mandated one, but said only that he authored it because of his long-term acquaintance with Nelson.

were labor organizations within the meaning of Section 2(5) of the Act.

2. By threatening the discharge of Douglas J. Nelson, unless he continued to pay membership dues or agency fees, in circumstances where he previously had been expelled from membership for protected decertification activities, the Respondents have restrained and coerced Nelson in the exercise of rights guaranteed him in Section 7 of the Act, and have thereby engaged in an unfair labor practice within the meaning of Section 8(b)(1)(A) of the Act.

3. This unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

The National Labor Relations Board orders that the Respondents, Transportation Workers Union of America, AFL–CIO, New York, New York, and Transportation Workers Union of America, Local 525, Cocoa Beach, Florida, their officers, agents, and representatives, shall

1. Cease and desist from

(a) Threatening to require the discharge of employees pursuant to a valid union-security provision if they ceased paying dues or agency fees in circumstances where the employees had previously been expelled from the Union for decertification activities protected by Section 7 of the Act.

(b) In any like or related manner restraining or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at their offices, and meeting halls, copies of the attached notice marked "Appendix."[12] Copies of the notices, on forms provided by the Regional Director for Region 12, after being signed by the Respondents' authorized representatives, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Sign and return to the Regional Director sufficient copies of the notice for posting by Johnson Controls World Services, Inc., if willing, at all places where notices to employees customarily are posted.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten employees with discharge pursuant to a valid union-security provision if they cease paying dues or agency fees in circumstances where we have previously expelled them from membership for decertification activities protected by Section 7 of the Act.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you Section 7 of the Act.

TRANSPORTATION WORKERS UNION OF AMERICA, AFL–CIO

TRANSPORTATION WORKERS UNION OF AMERICA, LOCAL 525

Michael Maiman, Esq., for the General Counsel.
Joseph Egan, Jr., Esq. (Egan, Levy, & Swicia, P.A.), of Orlando, Florida, for the Respondent Union.

DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. This is an unfair labor practice prosecution brought by the National Labor Relations Board's General Counsel acting through the Acting Regional Director for Region 12 in the form of a complaint and notice of hearing issued on June 30, 1994,[1] against the Transportation Workers Union of America, AFL–CIO, and its Local 525 (the Union). The complaint is based upon an unfair labor practice charge filed by Douglas J. Nelson, an individual, on February 17. I heard the case on November 7.

The case involves the scope of the Union's authority to enforce the discharge provisions in the union-security clause outlined in its collective-bargaining agreement with Johnson Controls World Services, Inc. (the Company). More specifically, it is alleged Local Union President Eddie Hill threatened Nelson with application of the discharge provisions of the union-security clause[2] should Nelson cease paying dues or agency fees when Nelson had previously been expelled[3] from the Union for circulating a petition seeking authorization from employees for another labor organization (Aero Space

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] All dates hereinafter 1994, unless otherwise indicated.

[2] The union-security clause involved provides for the discharge of an employee upon the Union's request when the employee has not paid the legally required agency fees or union dues. The lawfulness of the clause is not at issue herein.

[3] The parties stipulated the expulsion by the Union was lawful.

Maintenance Workers Union) at a time during which a petition could lawfully have been filed with the Board with such activity allegedly being protected by Section 7 of the National Labor Relations Act. If as counsel for the General Counsel asserts the Union committed an unfair labor practice, a second issue is whether President Hill acted as an agent of the International Union in the actions he took here. I will, as more fully explained below, conclude that the Union did not violate the Act in any manner alleged in the complaint. Accordingly, I need not reach the second issue.

FINDINGS OF FACT

I. JURISDICTION

The Company is a corporation with an office and place of business at Eastern Space and Missile Center, Cape Canaveral Air Force Station, Florida, where it is engaged in the business of providing ground support services for the United States Air Force. During the year preceding issuance of the complaint herein, a representative period, the Company provided services in excess of $50,000 to the United States Air Force pursuant to a service contract with the United States Government. The complaint alleges, the evidence establishes, and I find the Company is, and has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The record establishes that at all times material, the International Union and its Local 525 have been and are labor organizations within the meaning of Section 2(5) of the Act.

III. THE FACTS

The Union and the Company are parties to a collective-bargaining agreement which contains a union-security clause that provides for the discharge of an employee upon the Union's request, when that employee has not paid or tendered payment of representation fees or initiation fees and membership dues.[4] The facts surrounding the allegations are for the most part undisputed. Any conflicts will be addressed as they arise.

Nelson began working for the Company on August 25, 1975, and became a member of the Union approximately 90 days' later. He remained a member of the Union until, he asserts, he was expelled from membership in September 1992. During the time Nelson was a member of the Union he held the offices of shop steward, executive board member, vice president, and president.

On or about August 17, 1992, Nelson signed (as did several other employees) and circulated a petition seeking authorization from employees for representation by another (Aero Space Maintenance Workers Union) labor organization.[5] No petition was, however, filed with the Board.[6] Shortly after starting his presidency, President Hill became aware there was a movement trying to form a separate labor organization even though he was not immediately aware Nelson was involved.[7]

On or about August 28, 1992, President Hill informed Nelson in writing he had filed intraunion charges against him for his activities related to the petition for the rival labor organization.[8] According to President Hill, Nelson was ultimately expelled from membership in the Union because of his above-referenced activities.

In December 1992, Nelson wrote President Hill[9] expressing a belief he was no longer responsible for payment of union dues inasmuch as he had been expelled from the Union. Nelson testified President Hill thereafter sent him a memorandum outlining the procedure for becoming a *Beck*[10] objector and expressed the hope this would take care of the matter.

The record is somewhat unclear regarding what took place immediately thereafter; however, Nelson continued to pay union dues until December 1993, at which time he ceased doing so.

Thereafter, President Hill wrote Nelson the following letter:[11]

> February 4, 1994
>
> Douglas J. Nelson
> 12712 Forestedge Circle
> Orlando, Florida 32828
>
> Dear Mr. Nelson:
>
> As a nonmember, you are entitled to pay full dues or, in the alternative, you are required to pay agency fees. You have paid nothing the Local for the months of December, January, and February, 1994. You are delinquent in the amount of $94.83 (31.61 month) for agency fees. Please take care this arrearage immediately.
>
> In the future, if you wish to hand pay, the amount of $31.61 is due by the first of each month. If you wish to use check-off, the regular dues amount will be deducted but you will be eligible for a rebate at the end of the year.
>
> Sincerely,

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[4] No *Communication Workers v. Beck*, 487 U.S. 735 (1988), issue was raised or litigated in this case.

[5] Nelson held himself out to be and signed documents as vice president of the Aero Space Maintenance Workers Union. Nelson was also a member of the Union herein at the same time.

[6] The Union stipulated at trial that these events occurred during a time in which a petition could have been properly filed with the Board.

[7] Hill and Nelson have remained friends since they met in the early 1980s.

[8] Pertinent parts of Hill's letter states:

> "I, Eddie O. Hill, do hereby file charges against Douglas J. Nelson."
>
> The charges are as follows:
>
> D) Advocating or attempting to bring about the withdrawal from the International Union or any Local Union, or any member or group of members
>
> F) Working in the interest of or accepting membership in any organization dual to the International Union.

[9] Pertinent parts of Nelson's letter follows:

> Since I have been expelled from membership in the Transport Workers Union by action of the Local Executive Board and no longer have any rights as a Union Member or any say in the affairs of the Union or will have at any time in the future, I feel that paying union dues to an organization that I have been expelled from is improper.
>
> I have spoken to the National Labor Relations Board about this matter and have been advised that being forced to pay Union Dues as a condition of employment after being expelled from the Union would constitute an Unfair Labor Practice on the part of the Union.

[10] *Communications Workers v. Beck*, supra.

[11] Hill testified sending letters such as the one to Nelson was consistent with the Union's standard policy.

/s/Eddie O. Hill
Eddie O. Hill, President
TWU-Local 525, AFL–CIO

Nelson testified he telephoned President Hill on February 8, because he had questions regarding his status with the Local Union. Nelson asked President Hill why he sent the February 4 letter instead of the International Union as called for in the collective-bargaining agreement.[12] According to Nelson, Hill said it was because of their past friendship. Nelson testified he next asked Hill how long his expulsion was for and Hill said he didn't know. Nelson asked Hill since there was no date on the expulsion order was it safe to assume the expulsion was forever. According to Nelson, Hill said he guessed so. Nelson asked President Hill a number of questions regarding his rights related to attending union meetings, running for office, nominating candidates for office, attending union functions, or participating in collective bargaining. Nelson testified Hill said he could not do or participate in any of these activities. Nelson asked President Hill about whether if "in the future he fail[ed] to remit union dues, would the union seek [his] termination under the Agency Shop Clause." Nelson testified Hill said yes and they ended their telephone conversation.

President Hill acknowledged he probably did not recall the telephone conversation in question as well as Nelson did. Hill said Nelson "questioned" him on his expulsion and wanted to know if it was forever. Hill testified he told Nelson he simply didn't know. According to Hill, Nelson kept asking questions along the lines of could his expulsion be forever, and Hill responded he guessed so.[13] President Hill testified Nelson asked what would happen if he didn't pay any dues. Hill told Nelson, "Doug let's don't do that. You'd force me to enforce what's in the contract."

President Hill testified the Union never at any time sought Nelson's discharge. Nelson testified that since his expulsion he has not made any attempts to be reinstated to membership. Nelson explained, "[i]f I thought it would be well received, I would" Nelson has, at least as of the trial herein, continued to pay union dues and has remained gainfully employed by the Company.

President Hill and Nelson both appeared to be testifying truthfully to the best of their recollection. Although their testimony regarding their February 8 conversation may seem to conflict somewhat; any conflicts are not material and do not impact the outcome. To the extent that it is helpful, I find Nelson's recollection of the conversation to be better than President Hill's. Hill appears to acknowledge as much.

IV. DISCUSSION, ANALYSIS, AND CONCLUSIONS

Counsel for the General Counsel argues it is clear Nelson was permanently expelled from membership in the Union because he attempted to oust the Union as the collective-bargaining representative of certain employees of the Company and replace it with a rival labor organization. Counsel for the General Counsel urges Nelson's activities are protected by Section 7 of the Act. Counsel for the General Counsel argues the Board has consistently held a union may not lawfully invoke the union-security clause of its contract against an employee whose full union membership has been significantly impaired due to the exercise of Section 7 rights. Although counsel for the General Counsel cites a number of cases in support of his position he relies primarily on two cases, namely *Steelworkers Local 4186 (McGraw-Edison Co.),* 181 NLRB 992 (1990) (*McGraw-Edison*) and *Communications Workers Local 9509 (Pacific Telephone & Co.)*, 193 NLRB 83 (1971). Counsel for the General Counsel states that although the Board has made it clear in these (and like) cases, it finds no fault with internal union discipline imposed for engaging in rival union or protected decertification activities, it does find unlawful the invocation of a union-security clause where membership has been impaired for the exercise of Section 7 rights. Counsel for the General Counsel summarizes his position by stating that under *McGraw-Edison* and *Pacific Telephone* Nelson's membership status was lawfully impaired, but he argues the Union violated Section 8(b)(l)(A) of the Act by threatening to enforce a union-security clause against him. Finally, counsel for the General Counsel argues, at length, that the Board's decision in *Boilermakers (Kaiser Cement Corp.)*, 312 NLRB 218 (1993), does not require a contrary result than that which he advocates. Counsel for the General Counsel acknowledges that the Board in *Kaiser* found no violation of the Act where union members were disciplined—barred from holding union office or attending union meetings for a fixed numbers of years—because they circulated petitions designed to remove substantial numbers of positions from the bargaining unit. Counsel for the General Counsel urges two distinguishing factors between *Kaiser* and *McGraw-Edison*, first he urges the disciplined individuals in *Kaiser* remained members of the union (albeit with substantially impaired rights) and that the judge in *Kaiser* found no nexus between one of the four individuals decertification activities and the discipline imposed.

Counsel for the Union argues the Union's conduct is fully consistent with and controlled by the Board's decision in *Kaiser*. Counsel for the Union contends the Board in *Kaiser* acknowledged the distinctions drawn by the trial judge in *Kaiser* between the protected/unprotected nature of the conduct giving rise to the union discipline but found making such a distinction unnecessary. Counsel for the Union argues that in *Kaiser* the Board focused on whether the discipline was lawful and not whether the conduct causing the discipline was protected or unprotected. The Union contends by doing so the Board in *Kaiser* necessarily rejected any suggestion in *McGraw-Edison* that the protected/unprotected nature of the conduct given rise to the discipline was dispositive. Counsel for the Union asserts such a conclusion is inescapable because the conduct at issue in *Kaiser*—circulating a petition seeking to have the union removed so employees could bargain directly with the employer—clearly was protected. Counsel for the Union argues that *Kaiser* overruled *McGraw-Edison* sub silentio and that the complaint must be dismissed.

A review of certain portions of the Act is helpful at this point. The Union is charged with having violated Section 8(b)(1)(A) of the Act which provides:

> (b) It shall be an unfair labor practice for a labor organization or its agents
>
> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7 [Section 157 of this title]: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with

[12] Nelson explained the collective-bargaining agreement called for an International Union representative to send such a letter and that part of the letter was to remind the delinquent member that he/she had 15 days to pay up or the International Union would seek his/her discharge.

[13] Hill said the conversation was nonconfrontational.

respect to the acquisition or retention of membership therein;

Section 7 [Sec. 157.] reads as follows:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) [Section 158(a)(3) of this title.]

Section 8 [Section 158.] (a)(3)(B) provides:

> It shall be an unfair labor practice for an employer -
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization
>
> (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

The two primary cases (*McGraw-Edison* and *Pacific Telephone*) that counsel for the General Counsel relies on in support of a finding of a violation initially seem persuasive.

In *Pacific Telephone* two individuals (Lavers and Coupar) were expelled from membership in the Communications Workers of America, Local 9509 (CWA) because of their activities related to distributing literature and membership cards for the independent organization of Pacific employees for the purpose of obtaining signatures to decertify CWA as bargaining agent for certain Pacific Telephone employees. CWA expelled Lavers and Coupar pursuant to its constitution which provides for the fining, suspension, or expulsion of any member found guilty at a union trial of willfully supporting or assisting any persons, groups of persons, or organizations in any act or activities for the purpose of seeking or obtaining the decertification or replacement of CWA as collective-bargaining representative. After being expelled Lavers and Coupar refused to pay union dues to CWA. CWA then demanded that Pacific Telephone discharge Lavers and Coupar pursuant to its valid collective-bargaining agreement, which, under specified conditions, makes the payment of periodic dues a condition of employment. The Board citing *McGraw-Edison* found CWA in violation of Section 8(b)(1)(A) of the Act.

Briefly summarized the Board in *McGraw-Edison* found an 8(b)(1)(A) violation of the Act when the union insisted that an employee pay union dues on a penalty of discharge under a valid union-security agreement, during a period when his membership rights in the union had been significantly impaired by disciplinary sanctions imposed as a result of his filing a decertification petition. More specifically, in *McGraw-Edison* employee Arnold Blaine filed with the Board a petition seeking decertification of the incumbent union. After the union was redesignated by a majority in an election the union initiated disciplinary proceedings against Blaine and he was initially expelled from the union. Blaine appealed and his membership was reinstated, but the union suspended his right to attend union meetings for a period in excess of 1 year and indefinitely suspended him from holding union office. Thereafter, Blaine refused to pay union dues and the union threatened to invoke the union-security clause against him. Blaine thereafter paid dues to the union. The Board viewed *McGraw-Edison* as placing in issue its policy of providing unimpeded access to its procedures and remedies. The Board citing *NLRB v. Marine & Ship Building Workers*, 391 U.S. 418, 425 (1969), noted that any coercion used to discourage or defeat access to the Board is beyond the legitimate interest of a labor organization. The Board noted it was not confronted in *McGraw-Edison* with a situation where a union disciplined a member because the member filed a decertification petition simply by fining, expelling, or suspending the member. The Board acknowledged a reduction in membership rights standing alone does not necessarily violate the Act. The Board stated, however, that for the union to insist upon Blaine's continued payment of dues during periods when his rights as a member were significantly reduced constituted a continuing form of coercion attempting to operate as a "serious restraint" upon access to its processes. Specifically the Board concluded:

> The Union's insistence upon Blaine's payment of dues, on pain of discharge, cannot be considered as disassociated from the suspension of membership rights resulting from his decertification activity. We see no justification, either in the proviso to Section 8(b)(1)(A) or in considerations of a labor organization's need for self-preservation, for the steps taken against Blaine. The threat to enforce the union-security clause while continuing the sanctions against Blaine was hardly necessary to preserve the Union's existence as an institution, nor could it be viewed as a noncoercive form of internal discipline which would have no discouraging effect upon a member's decision to invoke the Board's representation procedures.
>
> It is for these reasons that we affirm the Trial Examiner's finding that a labor organization violates Section 8(b)(1)(A) by invoking, or threatening to invoke, a lawful union-security clause to enforce payment of dues by a member whose membership has been significantly impaired because he filed a decertification petition.[6]

[6] As our decision in this case is based on the coercive steps taken as a result of filing a decertification petition, we need not pass upon whether a labor organization violates Section 8(b)(1)(A) through enforcement of a union security-clause against a member whose membership was impaired for reasons unrelated to seeking access to Board decertification processes.

In two other cases cited by counsel for the General Counsel the Board found violations of the Act where labor organizations sought payment of dues from suspended members under threats to seek their discharge pursuant to valid union-security provisions contained in collective-bargaining agreements. In *Dillingham Tug & Barge Corp*., 278 NLRB 83 (1986), the Board adopted Judge James M. Kennedy's finding a violation of Section 8(b)(1)(A) of the Act where the union suspended employee/union member Francis Keane's membership for 15 years and fined him $863 as a result of his activities on behalf of a rival labor organization. Judge Kennedy wrote:

> Furthermore, it is clear that the expulsion and fine levied against him were based on his action in supporting the rival union. That, of course, is an activity protected by Section 7 of the Act. Respondent Union has, therefore, deprived Keane of the rights attendant full membership in the Union. Thus, when Respondent Union suspended him it simultaneously stripped him of any obligation to pay union dues. Section 8(a)(3)(B), as incorporated by Section 8(b)(2), states that it is unlawful to discharge or cause the discharge of an employee on union security grounds if that employee has been denied union membership for reasons other than his failure to tender periodic dues. Clearly that is the case here. Respondent Union suspended Keane because of his rival union activity. By that very act it denied him membership on grounds other than a failure to pay periodic dues. He was, therefore, not obligated to pay any dues whatsoever while membership was denied him.

In *Telephone Traffic Union*, 241 NLRB 826 (1979), the Board affirmed Judge George Norman's finding the union unlawfully threatened Louise Neunder with discharge pursuant to the agency-shop provisions of the governing collective-bargaining agreement unless she paid dues during a period in which she had been suspended from membership in the union for supporting the organizational efforts of a rival union. The Board in *Telephone Traffic Union* made it expressly clear the union's actions violated Section 8(b)(1)(A) of the Act even though Neunder was suspended because she exercised her Section 7 rights to support a rival union rather than to file a decertification petition.

Looking *only* at the above referenced cases I am persuaded counsel for the General Counsel established a violation of Section 8(b)(1)(A) of the Act. The Board in the cases outlined above has made it clear a union may not invoke a union-security clause of a collective-bargaining agreement against an employee whose full union membership has been significantly impaired due to the exercise of Section 7 rights.

Turning to the instant facts I first note the Company and the Union are parties to a collective-bargaining agreement with a valid union-security clause which provides for the discharge of an employee upon the Union's request if the employee does not pay the required agency fees. In August 1992, Nelson, a longtime employee and union office holder, signed and circulated a petition seeking to have a rival labor organization designated as the collective-bargaining representative for certain employees who were at the time (and continue to be) represented by the Union herein. On or about August 28, 1992, the Union (through President Hill) brought intraunion charges against Nelson because of his activities on behalf of the rival labor organization and thereafter expelled him from the Union. Nelson inquired and was told his expulsion could last forever. Nelson stopped paying dues to the Union in December 1993 and on or about February 4, 1994, was notified by the Union of his delinquency and asked to bring his dues current. On or about February 8 Nelson asked President Hill if in the future he failed to remit union dues would the Union seek his termination pursuant to the parties agency-shop clause in their collective-bargaining agreement. Hill responded in the affirmative.

Without specifically setting forth the elements of a violation drawn from the cases outlined earlier it is clear counsel for the General Counsel established a prima facie violation of the Act. This however does not resolve the matter.

Next I turn to an examination of the case relied upon by the Union in support of its contention the complaint must be dismissed. The Union argues the Board in *Kaiser* sub silentio overruled the cases relied on by counsel for the General Counsel and further urges that counsel for the General Counsel is wrong when he argues *Kaiser* does not require a contrary finding to that advocated by counsel for the General Counsel.

In *Kaiser* the Board looked at whether the union violated Section 8(b)(1)(A) of the Act by threatening four dissident employee-members with enforcement of the union-security clause if they discontinued paying membership dues after the union had substantially impaired their membership rights. The Board in *Kaiser* concluded the union did not violate the Act. In *Kaiser* the union disciplined four members for their activities which if successful would have eliminated all or a substantial part of the bargaining unit. One of the four was charged with bargaining with the company in order to disband the union and have the jobs converted into salaried positions. Two of the others were charged with aiding and abetting the activities of the first member and the fourth member was charged with circulating a petition seeking to eliminate the bargaining unit altogether. All four were found guilty as charged and all were barred from holding union offices and from attending union meetings except for meetings at which a contract directly affecting them was to be voted upon. The barrings ranged from 2 to 5 years. The one dissident that had been serving as local union president was suspended from office. The four wrote the international union president claiming the union had "in effect" suspended them from union membership and as such they were not required to pay union dues. The international union president responded that they had not been suspended from membership and they had an obligation to continue to pay dues. The four in *Kaiser* inquired of the international union president what penalties would be imposed if they ceased paying union dues. The International union president responded that if they failed to pay dues the union would inform the employer and the four "would no longer be allowed to work at the plant." In *Kaiser* Judge Michael D. Stevenson made an overall finding, which the Board affirmed, that the union had the right to protect itself against the alleged discriminatees activities which would have resulted in the erosion or the elimination of the bargaining unit it represented. Judge Stevenson concluded the General Counsel did not establish a prima facie case that the discipline violated Section 8(b)(1)(A) of the Act. Judge Stevenson also concluded, with Board approval, the union did not violate the Act by threatening to invoke the union-security clause of its collective-bargaining agreement because the alleged discriminatees were attempting to change either half or all of the bargaining unit jobs into salaried and/or supervisory positions. Judge Stevenson concluded the union had a *legitimate union interest* in preventing the erosion of its status as collective-bargaining representative. Although the Board in *Kaiser* noted "[Judge Stevenson] stressed that [*Kaiser*] is distinguishable from Local 4186, *United Steel Workers of America (McGraw-Edison Co.)*, 181 NLRB 992 (1970), in that the Board there found that the union had unlawfully threatened to invoke the union-security clause against a member whose membership it had significantly impaired because of the employee's protected conduct in filing a decertification petition" it also noted:

> The judge also rejected the General Counsel's alternate contention that even if the activities for which the

> Respondent disciplined the alleged discriminatees were not protected, the Respondent had so significantly reduced their membership rights that it could not lawfully enforce the union-security clause against these employees. The General Counsel's argument, in the judge's view, presented the Respondent with the "Hobson's choice" of either forgoing its right to discipline members under the proviso to Section 8(b)(1)(A) (thereby rendering the proviso to Section 8(b)(1)(A) a nullity) or relinquishing its right to enforce the provisions of a valid union-security clause (thereby ultimately self-destructing without the dues of disciplined members). The judge concluded that the General Counsel's position, if implemented, would induce any members who are unwilling to pay dues in the first place for financial or philosophical reasons to subject themselves to union discipline "so they would be 'punished' by not having to pay union dues, although they would continue their employment." For these reasons, the judge dismissed the complaint.

The Board in *Kaiser* found two actions involved, "(1) the Union's internal discipline of certain employees, which discipline impaired their membership in the Union; and (2) the enforcement of a union-security-clause against those employees, notwithstanding the fact that their membership was impaired." The Board continued "[t]hese two matters are analytically distinct, although in a given case they may be related." The Board pointed out "[I]f discipline is wholly internal, i.e., if it does not itself affect the employment relationship the Union may be able to impose the discipline even if it is aimed at a Section 7 right." The Board noted some examples but then observed:

> To be sure, there are limitations on the Union's right to impose discipline on members. One of these limitations is that the employee-members must be free to resign their membership and thereby escape the rule.[6] That is, employees have a right to resign from the union. If they resign prior to engaging in the Section 7 conduct deemed offensive by the union (e.g., crossing a picket line), the union cannot discipline them. If they have opted for continued membership, they cannot be heard to complain if the union enforces the rules of membership.

[6] *Scofield v. NLRB*, 394 U.S. 423 (1969).

The Board noted a second exception:

> There is another important exception to the general rule concerning a union's right to impose internal discipline on members. If the union's rule impairs a policy that Congress has embedded in the labor laws, the union may not enforce the rule, even against a member. Of Course, as we have seen, the mere fact that the discipline is in reprisal for a Section 7 right is not sufficient to condemn the discipline. See *Allis-Chalmers*. However, if the Section 7 right is the fundamental one of seeking access to the Board, the discipline in reprisal therefor may be unlawful.[7] Thus, for example, if the employee files a petition or a charge with the Board, the union cannot fine him for that action.[8]

[7] The Sec. 7 right of seeking access to the Board is fundamental in the sense that all others are dependent on it. If the employee cannot come to the Board, he c . . .annot vindicate any of his rights.

[8] See *NLRB v. Marine & Shipbuilding Wo*rkers, 391 U.S. 418 (1968); *Molders Local 125 (Blackhawk Tanning Co.)*, 178 NLRB 208 (1969).

Does, as the Union contend, *Kaiser* control the instant case warranting dismissal of the complaint or is, as counsel for the General Counsel contends, *Kaiser* distinguishable?

First, I note Nelson was a member of the Union at the time he engaged in the conduct the Union found offensive. There is no showing he could not have resigned his membership and escaped the discipline. Nelson's conduct of signing, circulating, and seeking to have others sign a petition to designate a rival labor organization as bargaining representative of certain employees of his employer was conduct designed to oust the Union herein from its role as collective-bargaining representative of the employees in question. Nelson was not only trying to oust the Union he was trying to have a rival labor organization installed that he was the vice president of. Nelson was defeated in his bid to again serve as president of the Union herein. The parties stipulated, and the record evidence supports the stipulation, that the Union legally imposed discipline on Nelson.

Having concluded, as outlined above, that the discipline was lawful the next issue under the analytical framework of *Kaiser* is whether the Union could threaten to enforce its contractual union-security clause against Nelson. There is somewhat limited guidance on this point in *Kaiser*. In that regard, the Board in *Kaiser* held, "[b]ecause the Respondent's discipline of these members did not violate the Act, the members continued, as unit employees, to be required under the union-security agreement to satisfy the sole obligation a union may enforce under a union-security provision: 'the tendering of uniform initiation fees (if any) and dues.' [Footnote omitted.]" Obviously the first requirement outlined above has been satisfied, namely that the discipline did not violate the Act. A critical question arises with respect to the remainder of the quote "the members continued, as unit employees, to be required under the union-security agreement to satisfy the sole obligation a union may enforce." Did the Board intend the operative word in this part of the quotation to be "members"? The overall tenor of the *Kaiser* decision persuades me it did not. The Board's main concern was whether the discipline was legally imposed. The Board's lengthy inclusion in *Kaiser* of Judge Stevenson's discussion of the "Hobson's choice" situation a union is placed in persuades me the Board did not intend for a union in a factual situation such as the one herein to have to chose between its right to discipline a member under the proviso to Section 8(b)(1)(A) of the Act and its right to enforce the provisions of a valid union-security clause. Nelson's conduct was directed toward the destruction of the Union that rejected him as its president and have the collective-bargaining representative replaced with a rival labor organization of which he was an officer, namely vice president. *Kaiser* makes it clear a union may protect its position in such situations.

It is obvious, as pointed out by counsel for the General Counsel, the Board was well aware of *McGraw-Edison* and related cases when it decided *Kaiser* and it did not avail itself of the opportunity to expressly overrule these earlier decisions. I am, however, persuaded in agreement with counsel for the Union, that the Board overruled sub silentio all prior contrary cases when it decided *Kaiser*.

In light of all the above I conclude the Union did not violate Section 8(b)(1)(A) of the Act by threatening to invoke the union-security clause against Nelson if he ceased paying dues after the Union disciplined him. Accordingly, I shall dismiss the instant complaint.

CONCLUSIONS OF LAW

1. Johnson Controls World Services, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Transportation Workers Union of America, AFL–CIO and its Local 525 are labor organizations within the meaning of Section 2(5) of the Act.

3. The Union has not engaged in the unfair labor practices alleged in the complaint.

[Recommended Order for dismissal omitted from publication.]